NO. 88-1310

FILED
FEB 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

# In the
# Supreme Court of the United States

OCTOBER TERM, 1988

CALVIN BRENT,
Petitioner

VERSUS

NATIONAL RAILROAD
PASSENGER CORPORATION
d/b/a
AMTRACK AND BOH BROTHERS
CONSTRUCTION COMPANY, INC.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## SUPPLEMENTAL APPENDIX

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**PLAINTIFFS**

CALVIN BRENT JR.

CONSOLIDATED W/

83-3686

45 USC 51

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)
FEDERAL EMPLOYERS LIABILITY ACT

A-2

| $ DEMAND | JUDGE/ MAG. NO. | COUNTY | JURY DEM. | DOCKET YR. | NUMBER |
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| Nearest $1,000 | J 3L08 | | | | |
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DEFENDANTS

83-4520

NATIONAL RAILROAD PASSENGER CORP d/b/a AMTRAK

(3)

BOH BROTHERS CONSTRUCTION CO., IN XYZ INSURANCE COMPANY

JURY

3RD PARTY COMPLT 7/31/84

THE NORTH RIVER INS. CO.

U.S. FIRE INSURANCE CO.

INTERNATIONAL SURPLUS LINES INS.

AMENDING COMPLT - 3/14/86

NO NEW PARTIES ADDED

ATTORNEYS

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586-1241
FOR: NATIONAL RAILROAD
PASSENGER CORP.
d/b/a AMTRAK

WEDNESDAY NOVEMBER 12, 1986
10:00 AM

a) MOTION OF PLTF, CALVIN BRENT, JR., FOR A JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, FOR A NEW TRIAL: **ORDERED DENIED.**

b) MOTION OF PLTF, CALFIN BRENT, JR., TO DISQUALIFY THE TRIAL COURT:
**ORDERED DENIED.**
**AFFIDAVITS OF DR. JUDICE, MARY LEDET, DARLENE SCELFO, LAWRENCE ARALL, ALLEN BORNE AND WALTER J. SONNETTE, JR., ORDERED ADMITTED AS PROFFERRED EVIDENCE ONLY.**

AFFIDAVITS ATTACHED

DATE OF ENTRY **NOV 13 1986**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
JUL 29 1986

| | | |
|---|---|---|
| RICHARD PRELL | * | CIVIL ACTION |
| | * | |
| VERSUS | * | NO. 83-3686 |
| | * | |
| NATIONAL RAILROAD PASSENGER CORPORATION, d/b/a AMTRACK, ET AL | * | SECTION "I" (3) |

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CONSOLIDATED WITH

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| CALVIN BRENT, JR. | * | CIVIL ACTION |
| | * | |
| VERSUS | * | NO. 83-4520 |
| | * | |
| NATIONAL RAILROAD PASSENGER CORPORATION, d/b/a AMTRAK, ET AL | * | SECTION "I" (5) |

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JUDGMENT

This action came on for trial before the court and a jury, the issues having been duly tried, a directed verdict having been entered by the court in favor of defendant National Railroad Passenger Corporation, d/b/a AMTRAK, and the jury having duly rendered its verdict for $41,000.00 in favor of Calvin Brent, Jr., and against Boh Bros, Construction Co., Inc. In entering the judgment on

the jury verdict, the court takes cognizance of the Stipulation between Calvin Brent, Jr. and the National Railroad Passenger Corporation d/b/a AMTRAK (AMTRAK Exhibit Number 10), of the lien by the Railroad Retirement Board (AMTRAK Exhibit Number 14), and of the seizure by Sun Finance Company, Inc. of plaintiff's interest in this lawsuit (AMTRAK Exhibit Number 12). Accordingly:

IT IS ORDERED AND ADJUDGED that there be judgment herein on the Complaint of Calvin Brent, Jr., in favor of defendant National Railroad Passenger Corporation d/b/a AMTRAK, dismissing plaintiff's suit against it at plaintiff's cost;

IT FURTHER ORDERED AND ADJUDGED that there be judgment herein in favor of plaintiff Calvin Brent, Jr. and against Boh Bros. Construction Co., Inc. in the sum of $26,017.92, together with interest thereon at the rate of 12% per annum from the date of judicial demand until paid and for his costs in this proceeding;

IT IS FURTHER ORDERED AND ADJUDGED that there be judgment herein in favor of the Railroad Retirement Board and against Boh Bros. Construction Co.; Inc. in the sum of $6,500.00 and in favor of National Railroad Passenger Corporation d/b/a AMTRAK and against Boh Bros. Construction Co., Inc. in the amount of $8,482.08, said amounts to be deducted from the amount of the verdict in favor of Calvin Brent, Jr., and paid by Boh Bros. Construction Co., Inc. pursuant to the Stipulation between Calvin Brent, Jr. and the National Railroad Passenger Corporation d/b/a AMTRAK (AMTRAK Exhibit Number 10) and in satisfaction of the lien by the Railroad Retirement Board (AMTRAK Exhibit Number 14).

IT IS FURTHER ORDERED AND ADJUDGED that the motion for summary judgment filed on behalf of National Railroad Passenger Corporation d/b/a AMTRAK be and the same is hereby granted and the motion for summary judgment filed on behalf of North River Insurance Company, United States Fire Insurance Company, and International Surplus Lines Insurance Company be and the same is hereby denied, reserving to the parties the right to request hearing on the third party demand of National Railroad Passenger Corporation d/b/a AMTRAK as to the amount of attorney's fees owed to it in the event the parties cannot reach an agreement thereto.

IT IS FURTHER ORDERED AND ADJUDGED that Boh Bros. Construction Co., Inc. is to deduct the sum of $3,439.72 from the verdict in favor of Calvin Brent, Jr., and pay said amount to Sun Finance Corporation, Inc. in satisfaction of its writ of Fieri Facias (AMTRAK Exhibit Number 12) issued pursuant to its judgment against Calvin Brent, Jr. and seizing all right of Calvin Brent, Jr. in this judgment.

New Orleans, Louisiana, this 29 day of July, 1986.

s/s Illegible

UNITED STATES DISTRICT JUDGE

ATTEMPT TO INTRODUCE ANY AFFIDAVITS OF ANY KIND OR ANY EVIDENCE BEYOND THE RECORD IN THIS CASE. WE HAVE FILED OUR OBJECTION OF RECORD IN OUR OPPOSITION, BUT I THINK FORMALLY AT THIS TIME WE OBJECT TO IT AND THE COURT SHOULD NOTE THAT THE AFFIDAVIT THAT I FILED WAS WITH A RESERVATION OF OUR OBJECTIONS OF GOING BEYOND THE RECORD FOR PURPOSES OF THIS MOTION.

THE COURT: ALL RIGHT. I AM GOING TO GO AHEAD AND LET EACH OF YOU PROFFER WHATEVER AFFIDAVITS YOU HAVE INTO THE RECORD, IF YOU WANT TO DO THAT.

THE COURT: ALL RIGHT. ARE YOU READY FOR THE RULING?

MR. DUPLANTIS: UNLESS YOU HAVE SOME QUESTIONS.

THE COURT: I AM FAMILIAR WITH THE CASE. WE SAT DOWN AND TALKED ABOUT IT EXTENSIVELY.

MR. FOSTER, DO YOU HAVE ANYTHING TO ADD BEFORE –

MR. FOSTER: YOUR HONOR, I CAN'T ADD ANYTHING THAT WE HAVEN'T DISCUSSED AND REHASHED OTHER THAN THE PLAINTIFF'S COUNSEL DID NOT PURSUE ANY REMEDY OF LAW THAT THE RULES GAVE HIM. THAT WAS HIS SOLE ELECTION, HIS FREE CHOICE AND INSTEAD SIMPLY ELECTED TO MAKE A STIPULATION. HE HAD OTHER REMEDIES AVAILABLE TO HIM AND

HE DIDN'T DO IT. SO IT COMES TOO LATE NOW.

THE COURT: ALL RIGHT. THE COURT HAS TWO MOTIONS HERE: PLAINTIFF'S REQUEST, THAT'S THE FIRST ONE, PLAINTIFF'S REQUEST FOR INTRODUCTION OF EVIDENCE AT MOTION FOR NEW TRIAL OR JNOV, AND; SECONDLY, PLAINTIFF'S MOTION FOR A NEW TRIAL OR JNOV.

THE FACTS: THE PLAINTIFF HAS MOVED FOR A NEW TRIAL OR JNOV ON THE BASIS THAT CERTAIN FACTS CONTAINED IN THE STIPULATION ARE INCORRECT. THE STIPULATION WE ARE REFERRING TO IS THE ONE THAT WAS ATTACHED TO THE DEPOSITION OF DOCTOR JUDICE, WHICH WAS READ TO THE JURY. THE PLAINTIFF WOULD LIKE TO INTRODUCE TESTIMONY OF DOCTOR JUDICE OR HIS AFFIDAVIT IN SUPPORT OF ITS MOTION FOR A NEW TRIAL OR JNOV.

THE MOVERS ARGUMENT IS THAT THE STIPULATION ATTACHED TO THE JUDICE DEPOSITION USED AT TRIAL WAS BASED ON INCORRECT FACTS. THEY ARGUED THAT A STIPULATION BASED ON INCORRECT FACTS OR WHICH OPERATES TO CREATE MANIFEST INJUSTICE SHOULD BE VACATED. THE OPPOSITION OF DEFENDANT IS THAT REGARDLESS OF WHETHER THE ALLEGATIONS IN THE STIPULATION ARE TRUE, THEY ARE THE LAW BETWEEN THE PARTIES AND CANNOT BE CHANGED. IF DOCTOR JUDICE WAS, IN FACT, UNDER A SUBPOENA, THE PLAINTIFF COULD HAVE ASKED FOR A CONTINUANCE OR MISTRIAL WHEN DOC-

TOR JUDICE DID NOT APPEAR. THE PLAINTIFF'S COUNSEL AGREED TO THE STIPULATION IN ORDER TO BE ALLOWED TO USE DOCTOR JUDICE'S DEPOSITION BEFORE THE JURY.

THE COURT'S ANALYSIS IS AS FOLLOWS: THE PARTIES ARE BOUND BY THE STIPULATION UNLESS MANIFEST INJUSTICE IS SHOWN OR IF THE EVIDENCE CONTRARY TO THE STIPULATION WAS SHOWN, CITING DONOVAN VERSUS HAYMAN'S DRIVE-INN, 661 F.2D 316 (FIFTH CIRCUIT, 1981).

THE PLAINTIFF CLAIMS THAT THE FACTS STIPULATED TO WERE INCORRECT AND THAT MANIFEST INJUSTICE OCCURRED WHEN STIPULATION ABOUT PLAINTIFF'S TREATING PHYSICIAN WAS READ TO THE JURY. ACCORDINGLY, PLAINTIFF ASSERTS THAT HE IS ENTITLED TO A JNOV OR TO A NEW TRIAL.

THE STANDARD FOR A JNOV IS THE SAME AS A DIRECTED VERDICT; WHICH IS AS FOLLOWS: A PLAINTIFF SHOULD PREVAIL ON A NOTION FOR JNOV ONLY WHEN THE FACTS AND INFERENCES POINT SO STRONGLY AND OVERWHELMINGLY IN FAVOR OF THE MOVING PARTY THAT REASONAABLE PERSONS COULD NOT ARRIVE AT A CONTRARY VERDICT. ON A MOTION FOR JNOV, THE COURT IS NOT FREE TO WEIGH THE EVIDENCE OR TO PASS ON CREDIBILITY OF THE EVIDENCE. THE COURT MUST VIEW THE EVIDENCE MOST FAVORABLE TO THE PARTY AGAINST WHOM THE MOTION IS MADE.

THE STANDARD FOR A NEW TRIAL IS AS

FOLLOWS: A VERDICT MAY BE SET ASIDE AND A NEW TRIAL GRANTED WHEN THE JURY'S VERDICT IS CONTRARY TO THE CLEAR WEIGHT OF THE EVIDENCE OR WHENEVER IN THE EXERCISE OF SOUND DISCRETION THE TRIAL JUDGE THINKS A NEW TRIAL IS NECESSARY TO PREVENT A MISCARRIAGE OF JUSTICE. ON A MOTION FOR A NEW TRIAL, THE COURT NEED NOT VIEW THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE NON MOVING PARTY AND MAY CONSIDER THE CREDIBILITY OF THE WITNESSES AND THE WEIGHT OF THE EVIDENCE.

IN THE INSTANT CASE, THE JURY RETURNED A VERDICT IN FAVOR OF CALVIN BRENT IN THE AMOUNT OF $41,000. THUS A JNOV IS CLEARLY INNAPPROPRIATE.

AS FOR PLAINTIFF'S MOTION FOR A NEW TRIAL, THE RECORD OVERWHELMINGLY SUPPORTS THE CONCLUSION THAT THE JURY VERDICT WAS NOT AGAINST THE GREAT WEIGHT OF THE EVIDENCE. IN FACT, THERE IS SUBSTANTIAL EVIDENCE IN SUPPORT OF THE JURY'S VERDICT. THUS REGARDLESS OF WHETHER THE STIPULATED FACTS WERE ERRONEOUS OR WHETHER THE COURT WAS IN ERROR IN PERMITTING INTRINSIC EVIDENCE IN CONNECTION WITH DOCTOR JUDICE'S PROFESSIONAL STATUS, THE GREAT WEIGHT OF THE EVIDENCE SUPPORTS THE JURY'S VERDICT. SO THAT JNOV OR A NEW TRIAL IS NOT WARRANTED BY THE RECORD.

IN THIS MATTER, THE COURT WAS INFORMED THAT A SUBPOENA HAD BEEN SERVED ON

DOCTOR JUDICE PRIOR TO THE TRIAL ON THE FRIDAY PRIOR TO THE TRIAL AND WHEN HE DID NOT SHOW UP FOR THE TRIAL, THERE WAS A CONFERENCE IN CHAMBERS AS TO WHETHER THE DEPOSITION PREVIOUSLY TAKEN OF DOCTOR JUDICE SHOULD BE ADMITTED. AND THE DEFENDANT OBJECTED TO THE ADMITTANCE BECAUSE DOCTOR JUDICE LIVES AND HAS HIS OFFICE IN HOUMA, WHICH IS ABOUT 50 MILES AWAY FROM THE COURTHOUSE AND ALLEGEDLY THE SUBPOENA WAS SERVED AT HIS OFFICE ON THE FRIDAY BEFORE THE TRIAL AND HE DIDN'T SHOW UP. AND THERE WAS A DISCUSSION IN THE CHAMBERS AS TO WHETHER THE DEPOSITION SHOULD OR SHOULD NOT BE ADMITTED AND A COMPROMISE WAS AGREED UPON BETWEEN THE ATTORNEYS PROVIDING THAT THE DEPOSITION OF DOCTOR JUDICE WOULD BE ADMITTED WITH THE STIPULATION THAT APPEARS IN THE RECORD.

AND THERE IS NO QUESTION THAT THERE HAS NEVER BEEN ANY ALLEGATION THAT THE FACTS REPRESENTED BY MR. FOSTER WERE IN BAD FAITH OR WERE NOT — IN OTHER WORDS, THERE WAS SIMPLY NO CLAIM OTHER THAN HE WAS REPRESENTING WHAT HE BELIEVED TO BE TRUE AT THE TIME. AND FROM THE COURT'S STANDPOINT, THE ATTORNEY FOR THE PLAINTIFF HAD AN OPPORTUNITY, IF HE HAD SO DESIRED, TO EITHER GO TO THE TELEPHONE AND FIND OUT WHETHER THOSE FACTS WERE CORRECT OR TO DO WHATEVER HE DEEMED APPROPRIATE TO CHECK ON THE INFORMATION THAT WAS BEING PROVIDED IN CHAMBERS. AND IF IT DEVELOPS NOW THAT THOSE FACTS ARE

NOT CORRECT, IT WOULD APPEAR THAT IT IS SIMPLY THE RESULT OF THE FAILURE OF THE PLAINTIFF'S COUNSEL TO MAKE ANY CHECK AS TO WHETHER THOSE FACTS WERE CORRECT. AND FROM THAT STANDPOINT, IT WAS A STRATEGY DECISION THAT WAS MADE AT THAT POINT SO AS TO BE ABLE TO HAVE A DEPOSITION READ TO THE JURY WHICH OTHERWISE MIGHT NOT HAVE BE READ.

BUT BE THAT AS IT MAY, FOR THE REASONS THAT I HAVE JUST READ INTO THE RECORD, COURT WILL DENY THE PLAINTIFF'S MOTION FOR A NEW TRIAL OR A JNOV AND THE COURT WILL FURTHER DENY THE PLAINTIFF'S REQUEST FOR INTRODUCTION OF ADDITIONAL EVIDENCE OR TESTIMONY.

NOW, IF THE PARTIES WANT TO PROFFER THEIR AFFIDAVITS, YOU CAN DO SO AT THIS TIME ARE AND THEY WILL BE MADE PART OF THE RECORD BY PROFFER ONLY.

MR. DUPLANTIS: WE WOULD LIKE TO PROFFER ALL THE AFFIDAVITS WE SPOKE ABOUT EARLIER AND ALSO I WOULD LIKE TO DIRECT YOUR ATTENTION TO THE MOTION FOR JNOV AND NEW TRIAL WAS ALSO DIRECTED TO THE DIRECTED VERDICT AS TO AMTRAK AND I DON'T BELIEVE YOU SPOKE TO THAT.

THE COURT: MY RULING WOULD BE THE SAME ON THAT.

MR. FOSTER: SUBJECT TO OUR OBJECTION, WE WILL GO AHEAD AND PROFFER MY AFFIDAVITS, ALSO.

THE COURT: IS THAT YOUR OWN AFFIDAVIT?

MR. FOSTER: YES, IT'S MY OWN AFFIDAVIT, MR. BORNE HAS FILED HIS AFFIDAVIT AND HIS PARTNER'S AFFIDAVIT AS WELL AS MR. ARCELL'S AFFIDAVIT.

THE COURT: WHAT ARE THE DATES OF THOSE AFFIDAVITS, SINCE THIS NOTION HAS BEEN FILED.

MR. FOSTER: YES, SIR, AFTER COUNSEL'S MOTION HAD BEEN FILED AND HE FILED THE MOTION I THINK LAST WEEK OR THE WEEK BEFORE, I AM NOT SURE, YOUR HONOR, TO SUBMIT AFFIDAVITS AND THAT'S WHEN THEY WERE DONE.

THE COURT: WELL, THEY ARE VERY RESENT, THEY ARE WITHIN THE LAST WEEK OR TEN DAYS?

MR. FOSTER: I THINK THAT'S CORRECT, YOUR HONOR.

THE COURT: IN OTHER WORDS, THEY ARE NOT OLD AFFIDAVITS.